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8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN FRANCISCO DIVISION

11 E.K. WADE,	} Consolidated Cases
	} No. C 08-00001 JSW
12 Plaintiff,	} No. C 08-00021 JSW
	}
13 v.	}
	}
14 ELAINE CHAO, SECRETARY OF	} THE FEDERAL DEFENDANT'S
15 LABOR, ET AL.	} OPPOSITION TO PLAINTIFF'S
	} REQUEST OF ENTRY OF DEFAULT
16 Defendant.	}
	}
	}

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18 INTRODUCTION

19 On April 8, 2008, Plaintiff E.K. Wade (“Plaintiff”) filed a Request for Entry of Default  
 20 against defendant Elaine Chao Secretary of the Department of Labor (“Federal Defendant”).  
 21 Plaintiff claims that he is entitled to entry of default because the Federal Defendant has not filed  
 22 an answer with respect to his complaint asserted against her. However, the Federal Defendant  
 23 timely moved to dismiss certain claims in Plaintiff’s complaint; therefore, Plaintiff is not entitled  
 24 to entry of default.

25 STATEMENT OF RELEVANT FACTS

26 On February 22, 2008, the parties entered into a Joint Stipulation to Consolidate the  
 27 Cases and Extend the Time for the Federal Defendants to File A Responsive Pleading  
 28 (“Stipulation”). Per the Stipulation, the Federal Defendants were to file a responsive pleading by  
 March 19, 2008. On March 19, 2008 the Federal Defendants filed a motion to dismiss, *inter*

1 *alio*, the Seventh and Eighth causes of action in complaint C-08-00021 JSW (“Motion to  
 2 Dismiss”). The Federal Defendant’s Reply in support of its Motion to Dismiss is due on April  
 3 11, 2008, and the hearing on the Motion to Dismiss is scheduled for May 9, 2008.

4 **ANALYSIS**

5 Pursuant to Rule 12 of the Federal Rules of Civil Procedure, a defendant may move to  
 6 dismiss or answer in response to a complaint. Fed. R. Civ. P. 12 *et seq.* Further, pursuant to Rule  
 7 12(a)(4)(A) of the Federal Rules of Civil Procedure, the defendant has ten days from the denial  
 8 of a motion to dismiss to file a responsive pleading and or to answer a complaint. Fed. R. Civ. P.  
 9 12(a)(4)(A). This is true even if the defendant only moves to dismiss certain causes of action as  
 10 opposed to the entire complaint, as was done in the instant case. See e.g., I-Enterprise Co. LLC  
 11 v. Draper Fisher Jurvetson Management Co., Civ. No 03-1561 MMC, 2005 WL 3590984 (N.D.  
 12 Cal. Dec. 30 2005) at \* 2. In I-Enterprise, the defendants did not file an answer, but rather filed  
 13 a motion to dismiss certain causes of action alleged in the Third Amended Complaint. The court  
 14 found that pursuant to Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, when a motion  
 15 to dismiss has been filed, the defendant is not required to answer the complaint until ten days  
 16 after the Court rules on the motion. Id. at \*2.

17 Because the Court has not yet issued a ruling on the Federal Defendants’ Motion to  
 18 Dismiss, no answer or other responsive pleading is yet due.

19 **CONCLUSION**

20 For the foregoing reasons, the Plaintiff’s Request for Entry of Default should be denied.

21 Respectfully submitted,

22  
 23 JOSEPH P. RUSSONIELLO  
 United States Attorney

24 /s/  
 25  
 26  
 27  
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Dated: April 9, 2008

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MELISSA K. BROWN  
 Assistant United States Attorney

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

**THE FEDERAL DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST OF  
ENTRY OF DEFAULT**

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

**FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

## **PERSONAL SERVICE (BY MESSENGER)**

## FEDERAL EXPRESS

**FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

E.K. Wade  
542 North Civic Drive, Apt. D  
Walnut Creek, CA 94597

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 9, 2008 at San Francisco, California.

/S/  
**MANIK BOWIE**  
Legal Assistant